

July 8, 2008

Employment Security Department
Unemployment Insurance Division
Olympia, WA

Dear ESD:

Thank you for allowing us the opportunity to comment upon the emergency rule. Please accept our comments as made in good faith and as made with our best efforts to represent, as best we can with limited time and resources, the interests of workers in Washington who must navigate the unemployment benefits system.

Sections of Proposed Rule	Comments
WAC 192-150-170 Meaning of Good Cause—RCW 50.20.050(2). (1) General.	Initially, we note that in the “Issue Brief” that accompanied the emergency rule it is stated that the emergency rule is an attempt to remain consistent with the <i>Spain</i> decision “using law prior to ESSB 6097” as a model. We note that this has been true in some instances in the proposed emergency rule, but that it falls short in other instances, as discussed more below.
(b) Other factors constituting good cause—RCW 50.20.050(2)(a). In addition to the factors above, the department may also determine that you had good cause to leave work voluntarily for reasons other than those listed in RCW 50.20.050(2)(b). (i) For separations under subsections (ii) and (iv) below, all of the following conditions must be met to establish good cause for voluntarily leaving work:	Adding these additional factors as an extra layer of requirements to those that already exist in the language of proposed (ii) – (iv) seems at odds with several court cases in the past year that have reminded the Department that the ESA is to be liberally interpreted. This extra layer of requirements makes that interpretation less likely to occur and do not appear in the statute.

<p>(A) You left work primarily for reasons connected with your employment; and</p> <p>(B) These work-connected reasons were of such a compelling nature they would have caused a reasonably prudent person to leave work; and</p> <p>(C) You first exhausted all reasonable alternatives before you quit work, unless you are able to show that pursuing reasonable alternatives would have been futile.</p>	
<p>(ii) Substantial involuntary deterioration of the work. As determined by the legislature, RCW 50.20.050(2)(b), subsections (v) through (x), represent changes to employment that constitute a substantial involuntary deterioration of the work.</p>	<p>While this was one of the “good causes” prior to 2004, this portion of the proposed emergency rule does not appear to revert to the pre- ESSB 6097 criteria but merely refers back to the present “stand alone good cause factors.” This section seems to say “the only substantial deterioration situations that the ESD will recognize are already codified,” which is at best circular and really does not return us to pre-ESSB 6097 criteria, although subsection (iv) below (undue hardship) does seem to do so to some extent. It seems under the reasoning of the <i>Spain</i> decision, leaving “substantial involuntary deterioration” as a broader category than the “stand alone” factors would be the better path or alternatively, combining it with “undue hardship” as it was prior to 2004.</p>
<p>(iii) Other changes in working conditions. Changes to your working conditions other than those included in RCW 50.20.050(2)(b)(v)-(x) will be evaluated under WAC 192-150-150 to determine if they constitute a refusal of an offer of new work.</p>	<p>This section again refers back only to the “substantial deterioration” criteria already recognized in the “stand alone” categories, and if the impact of <i>Spain</i> is to expand beyond those categories, restricting the emergency rule to only those factors already codified does not</p>

	<p>seem to do the job.</p> <p>One can imagine situations that constitute a substantial deterioration in the workplace but do not constitute a “refusal of new work,” but that should nevertheless constitute “good cause” to leave that work. The <i>Spain</i> case itself is an example. The workplace deteriorated – not for any of the reasons codified by the stand alone factors at (v) – (x) – and the deterioration was obviously not an offer of new work; the employer did not say “We understand the workplace has deteriorated, but those are the new conditions we are offering under which you will work.” Consequently, the proposed emergency rule’s confining “changes in working conditions” to either the stand alone factors or offers of new work again does not seem consistent with the decision that prompted the emergency rule.</p>
<p>(iv) Unreasonable hardship. Other work-connected circumstances may constitute good cause if you can show that continuing in your employment would work an unreasonable hardship on you. “Unreasonable hardship” means a result not due to your voluntary action that would cause a reasonable person to leave that employment. The circumstances must be based on existing facts, not conjecture, and the reasons for leaving work must be significant.</p> <p>Examples of work-connected unreasonable hardship circumstances that may constitute good cause include, but are not limited to, those where:</p>	<p>This seems reasonable, especially the proviso that the examples are not limited to these two.</p>

<p>(A) Repeated behavior by your employer or co-workers creates an abusive working environment.</p> <p>(B) You show that your health or physical condition or the requirements of the job have changed so that your health would be adversely affected by continuing in that employment.</p>	
<p>(2) Commissioner Approved Training. After you have been approved by the department for Commissioner Approved Training, you may leave a temporary job you have taken during training breaks or terms, or outside scheduled training hours, or pending the start date of training, if you can show that continuing with the work will interfere with your approved training.</p>	<p>This appears to be recognition of Division I's opinion in <i>Gaines v. ESD</i> in September 2007 and is a welcome addition.</p>
<p>Compelling personal reasons?</p>	<p>We strongly urge that "compelling personal reasons" should be a part of the emergency rule. The <i>Spain</i> case explicitly cited <i>Ayers v. ESD</i> and <i>In re Bale</i>.</p> <p>Both of these cases found that "compelling personal reasons" were sufficient "good cause" under the voluntary quit provisions. Surely the high Court's citation to those cases indicates that those cases are still "good law."</p> <p>Further, in both of those cases the "good cause" reasons were spousal work transfers. If the stated purpose of the proposed emergency rule is to return to pre-ESSB 6097 law, then certainly mandatory spousal transfers were</p>

	<p>good cause at that time – and prior to that time spousal transfers generally were good cause.</p> <p>A third sound reason for including spousal transfers as “good cause” is because the ESD’s own studies of the impact of the 2004 changes have shown that those changes have had a disparate impact on women in the workplace – particularly the changes in the spousal transfer provisions due to the disparate wages paid to women.</p> <p>But we also strongly urge that “compelling personal reasons” not be confined to spousal transfers. Many reported judicial decisions (e.g., <i>Vergeyle, Coleman</i>) and Commissioner’s Decisions (e.g., <i>In re Meyer</i>, Comm. Dec. 1st 1158; <i>In re Chrstie</i>, Comm. Dec. 2d 262) have found “good cause” for reasons that do not fit neatly into any one category. Providing such a category seems to provide the discretion contemplated by the Court in <i>Spain</i>, by the issue brief that accompanies this emergency rule, by decades of reported decisions, and by our sense that one cannot possibly codify every single “good cause” for leaving one’s work.</p>
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Thanks once again for this opportunity to comment on the proposed emergency rule. Our staff attorneys and law student interns, interns from all three of Washington’s law schools, all participated in reviewing the rule and discussing it. It was therefore a welcome opportunity to demonstrate how citizens and government agencies can work together to improve the law and to improve the lot of workers in Washington. We look forward to further participation as the process continues into August.

Best regards,

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